

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: David Noriega	Team: Team # 3	CCRB Case #: 201007012	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 05/24/2010 9:20 PM	Location of Incident: § 87(2)(b)	Precinct: 67	18 Mo. SOL 11/24/2011	EO SOL 11/24/2011	
Date/Time CV Reported Tue, 05/25/2010 5:31 AM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Tue, 05/25/2010 10:31 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Jason Drake	14710	946953	BS IRT
2. SGT Andrew Tolson	05209	933412	PBBS

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Kirk Birmelin	00230	946784	BS IRT

Officer(s)	Allegation	Investigator Recommendation
A.POM Jason Drake	Abuse: PO Jason Drake issued improper summonses to § 87(2)(b) and § 87(2)(b)	§ 87(2)(b)
B.SGT Andrew Tolson	Abuse: Sgt. Andrew Tolson authorized the issuance of improper summonses to § 87(2)(b) and § 87(2)(b)	§ 87(2)(b)

Case Summary

§ 87(2)(b) filed this complaint via the CCRB's website on May 25, 2010.

On May 24, 2010, at approximately 9:20 p.m., PO Jason Drake of the Brooklyn South Impact Response Team issued disorderly conduct summonses to § 87(2)(b) and § 87(2)(b) in the vicinity of § 87(2)(b) in Brooklyn. PO Drake's supervisor, Sgt. Andrew Tolson of the 67th Precinct, authorized the summonses. The following allegations emerged from the incident:

Allegation A – Abuse of Authority: PO Jason Drake issued improper summonses to § 87(2)(b) and § 87(2)(b).

Allegation B – Abuse of Authority: Sgt. Andrew Tolson authorized the issuance of improper summonses to § 87(2)(b) and § 87(2)(b).

§ 87(2)(g)
§ 87(2)(g)
§ 87(2)(g)
§ 87(2)(g).

This case was initially assigned to Investigator Clifford Tucker. The case was reassigned to the undersigned investigator on June 28, 2010 upon Investigator Tucker's resignation from the CCRB.

On June 1, 2010, the CCRB's mediation unit determined that, because the sole allegation in this complaint revolved around the summonses issued, the case was ineligible for mediation.

Results of Investigation

Civilian Statements

Complainant/Victim: § 87(2)(b)

- § 87(2)(b).
- § 87(2)(b).

Statements to NYPD

§ 87(2)(b) filed a complaint in writing with the 67th Precinct on an unknown date [Encl. C 8-9]. His written statement is consistent with his statements to CCRB, which are summarized below.

CCRB Testimony

§ 87(2)(b) provided a written statement on filing his online complaint on May 25, 2010 [Encl. C 1-5]. He provided a telephone statement on June 1, 2010 [Encl. C 10] and was interviewed at the CCRB on July 9, 2010 [Encl. C 11-16]. § 87(2)(b) provided an additional phone statement on March 3, 2011. These statements were consistent and are summarized below.

On May 24, 2010, at approximately 9:20 p.m., § 87(2)(b) and two friends, § 87(2)(b) and § 87(2)(b) were gathered outside of § 87(2)(b)'s car, which was parked in front of § 87(2)(b)'s residence, located at § 87(2)(b) in Brooklyn. The vehicle was parked in front of a fire hydrant, and § 87(2)(b) was standing directly outside the open driver's door. § 87(2)(b) added that there had been a shooting on that block in the days prior, and in consequence there had been officers assigned to foot posts in the vicinity.

The three men had been gathered around § 87(2)(b)'s car speaking for a few minutes when PO Jason Drake and PO Kirk Birmelin approached them on foot. § 87(2)(b) identified the officers by last name and shield number, which the officers provided during the course of the incident.) As the officers passed by, § 87(2)(b) greeted them by saying, "Good evening." PO Drake responded by saying, "You have to move that car." § 87(2)(b) found PO Drake's attitude confrontational and aggressive. § 87(2)(b) replied with something to the effect of, "We're just sitting here." PO Drake then said, "If you don't move that car by the

time I get up to the corner and back, I'm going to write you a summons." PO Drake and PO Birmelin continued walking, and § 87(2)(b) immediately entered his vehicle and moved it to an open spot nearby. § 87(2)(b) went inside his house to put on shoes. § 87(2)(b) who was offended by PO Drake's attitude, followed him to the end of the block with a pen and paper in hand. When PO Drake turned around, § 87(2)(b) asked him for his name and shield number. PO Drake initially ignored § 87(2)(b)'s request and continued walking, but § 87(2)(b) stood in front of him, read his name off his nameplate, and began to write it down. At this point PO Drake said his name and shield number. PO Drake, who seemed to have become agitated and increasingly aggressive in response to § 87(2)(b)'s efforts to obtain his information, then said, "I'm going to issue you a summons for that car." § 87(2)(b) replied that the car was not his and had been moved. PO Drake then said, "Well, I'm going to give you a summons for congregating." § 87(2)(b) said, "Congregating? How do you figure that?" and pointed out that he and his friends were no longer gathered in the same place. During this interaction, PO Birmelin remained calm and quiet and appeared embarrassed by PO Drake's behavior (he shook his head at various points in the incident).

§ 87(2)(b) and the two officers returned to the location where the car had been parked. § 87(2)(b) had moved the vehicle to a legal spot on the same block). By this point, § 87(2)(b) was once again standing outside his car, and § 87(2)(b) had emerged from his house. PO Drake immediately requested ID from all three individuals, and they complied. § 87(2)(b) also provided PO Birmelin with ID indicating that he was a retired member of service; PO Birmelin drew PO Drake's attention to this fact, but PO Drake ignored him. The civilians – primarily § 87(2)(b) and § 87(2)(b) – attempted to speak calmly to PO Drake, but PO Drake simply repeated that he would be issuing them summonses for congregating. § 87(2)(b) stated that PO Drake never issued the civilians an explicit order to disperse.

§ 87(2)(b) then requested to speak to PO Drake's supervisor. PO Drake called Sgt. Andrew Tolson to the scene. When Sgt. Tolson arrived, PO Drake told him that he had issued the individuals an order to disperse which they had failed to obey. § 87(2)(b) then spoke to Sgt. Tolson and disputed this claim, also telling Sgt. Tolson that PO Drake's attitude was aggressive and insensitive. Sgt. Tolson attempted to excuse PO Drake's behavior by telling § 87(2)(b) that PO Drake was from out of town. Sgt. Tolson, who had been informed that § 87(2)(b) was a former police officer, also said something along the lines of, "Well, we have CompStat now." § 87(2)(b) became frustrated by the encounter and stopped talking to Sgt. Tolson. PO Drake then issued summonses to § 87(2)(b) and § 87(2)(b) indicating the offense as disorderly conduct (refusal to disperse). All officers then left the scene.

On March 3, 2011, § 87(2)(b) stated to the undersigned that, when his summons was dismissed, the judge stated that the summons was written improperly, explaining that "congregating" is not a valid offense.

Complainant/Victim: § 87(2)(b)

- § 87(2)(b)

CCRB Testimony

§ 87(2)(b) provided a phone statement on June 2, 2010 and was interviewed at the CCRB on June 11, 2010 [Encl. C 17-21]. § 87(2)(b), § 87(2)(i)

§ 87(2)(b) stated that, when § 87(2)(b) and PO Drake walked back to the area where the car had been parked, PO Drake told the men not to "give [him] any problems" or he would issue them summonses for refusing to move. § 87(2)(b) replied to PO Drake that he had not told them to move, but rather had told them to move the car. PO Drake again told § 87(2)(b) not to "give [him] a problem." Once Sgt. Tolson had arrived on the scene, § 87(2)(b) entered and exited his house approximately three times (to chase his cat in the house and to get something to drink). During one of his moments outside of the house (while Sgt. Tolson was present) PO Drake asked § 87(2)(b) for ID, which he provided. PO Drake then issued the three civilians summonses and all officers left the scene.

Complainant/Victim: § 87(2)(b)

- § 87(2)(b) declined to provide a sworn statement to the CCRB.

Statements to NYPD

§ 87(2)(b) provided the CCRB with a copy of his written complaint to the NYPD [Encl. C 22-30]. The complaint form does not indicate when the report was filed. § 87(2)(b), § 87(2)(g)

§ 87(2)(b) wrote that, when § 87(2)(b) and PO Drake returned to the area where the car had been parked, PO Drake said, “Get off the street or I’m going to issue you citations for illegally congregating.” § 87(2)(b) then asked PO Drake to explain how this law was applicable, and PO Drake replied, “It is illegal for 2 or more people to congregate on the street according to the law.” When § 87(2)(b) further questioned PO Drake about this law, telling him they had been gathered peacefully and quietly, PO Drake replied, “If you don’t know, then you need to go to law school to find out.” It is unclear whether these statements were directed specifically at § 87(2)(b) or at all civilians present, or to whom these statements were audible.

NYPD Statements:

Subject Officer: PO JASON DRAKE

- § 87(2)(b)
- *67th Precinct Impact footpost, in uniform, with PO Birmelin, from 7:30 p.m. on May 24, 2010 until 4:05 a.m. on May 25, 2010.*

Memo Book

PO Drake’s memo book [Encl. D 1-3] indicates that three males were stopped in front of 121 East 96th Street at 9:30 p.m., and that all three subsequently received criminal summonses for “failure to disperse.”

Summonses

On the summonses he issued to § 87(2)(b) and § 87(2)(b) [Encl. D 4-6], PO Drake categorized the offense under New York State Penal Law §240.20(6) (disorderly conduct, subsection 6). The description of the offense on the summons issued to § 87(2)(b) reads: “Congregates with 2 others refuses to move.” On the summons issued to § 87(2)(b) it reads: “Failure to move congregates with others.” The description on the summons issued to § 87(2)(b) is illegible.

CCRB Testimony

PO Drake was interviewed at the CCRB on October 14, 2010 [Encl. D 7-8].

On May 24, 2010, PO Drake and PO Birmelin were assigned to a footpost at 151 East 96 Street in Brooklyn, the site of a shooting two days prior. PO Drake described his assignment as getting “as much activity as possible,” and clarified that “activity” refers essentially to summonses not necessarily related to the shooting. PO Drake further stated that part of the orders given to officers assigned to shooting posts is to keep crowds from congregating on the sidewalk. PO Drake added that any group of three or more people constitutes a crowd and is liable to be ordered to disperse. He further stated that, because “they [any group of individuals] don’t own the sidewalk,” the act of congregating is itself sufficient to justify an order to disperse, independently of any additional actions or behavior on the part of the gathered individuals.

At approximately 9:20 p.m., PO Drake saw § 87(2)(b) who was by himself at the time, standing outside the driver’s door of a vehicle parked in front of a fire hydrant. PO Drake and PO Birmelin walked by, and PO Drake ordered § 87(2)(b) to move the vehicle. § 87(2)(b) replied by saying, “I’m waiting.” PO Drake told § 87(2)(b) that he would walk to the end of the block and turn around, and if the car was not moved by the time he got back § 87(2)(b) would receive a summons. PO Drake and PO Birmelin walked to the corner of East 96 Street and Rutland Road and turned around to find that § 87(2)(b) had followed them.

§ 87(2)(b) was agitatedly saying things along the lines of, “You can’t talk to me that way, you’re not allowed to do that.” § 87(2)(b) asked PO Drake for his name and shield number, and PO Drake immediately replied, “Officer Drake, 14710.” PO Drake did not react to § 87(2)(b)’s request for information in any other way.

PO Drake, PO Birmelin and § 87(2)(b) walked back to the initial location of the vehicle, and PO Drake saw that the car had been moved to a legal parking spot. § 87(2)(b) and § 87(2)(b) were now standing in the vicinity of the parked vehicle. PO Drake told § 87(2)(b) and § 87(2)(b) that they were not allowed to gather on the sidewalk, and told them to move. The individuals refused to move, stating that PO Drake was “violating [their] rights” and that they intended to file a complaint. PO Drake repeated his order, stating, “If you refuse to move I’m going to issue you a summons.” PO Drake stated that he ordered the civilians to move approximately four times, and they persistently refused. PO Drake then requested ID’s from § 87(2)(b) and § 87(2)(b) and all three complied. § 87(2)(b) then informed PO Drake that he was a former member of the service, but this had no effect on the unfolding of the incident.

§ 87(2)(b) requested to speak to PO Drake’s supervisor, and Sgt. Tolson was called to the scene. PO Drake explained the situation to Sgt. Tolson, informing him that he intended to issue the three civilians summonses and that they intended to file a complaint about the incident. § 87(2)(b) then spoke to Sgt. Tolson, but PO Drake was unable to hear the content of their conversation. After running their ID’s for warrants, PO Drake issued § 87(2)(b) and § 87(2)(b) summonses for disorderly conduct in regards to their refusal to follow his order to disperse. PO Drake stated that he did not issue these summonses for any reason other than the offense listed. PO Drake further stated that he did not threaten to issue summonses for congregating at any point prior to his return to the parked vehicle and his encounter with § 87(2)(b) and § 87(2)(b) i.e., prior to the actual instance of congregating for which the summonses were issued.

Subject Officer: SGT. ANDREW TOLSON

- *White male, § 87(2)(b).*
- *Impact supervisor, in uniform, in a marked RMP operated by PO § 87(2)(b) Avosso, on a tour from 7:20 p.m. until 4:17 a.m.*

Memo Book

Sgt. Tolson indicated in his memo book [Encl. D 14-16] that, at 9:42 p.m., he arrived at 123 East 96 Street, and that PO Drake issued three c-summonses for disorderly conduct, “failure to disperse.”

CCRB Testimony

Sgt. Tolson was interviewed at the CCRB on November 30, 2010 [Encl. D 17-18].

Sgt. Tolson stated that, on May 24, 2010, PO Drake and PO Birmelin were assigned to a foot post in the vicinity of 123 East 96 Street in regards to a recent shooting in the area. Sgt. Tolson explained that officers assigned to shooting posts are ordered to “keep the streets clear,” i.e., prevent groups of people from congregating in public areas. Sgt. Tolson stated, however, that it is not specified to officers what number of people constitutes such a group, nor are officers given a specific set of actions or behavior on the part of gathered individuals that justifies an order to disperse. Rather, Sgt. Tolson stated that officers are told to exercise their individual discretion in deciding whether or not a group of people warrants such an order.

On the above date, at approximately 9:40 p.m., Sgt. Tolson received a cell phone call from PO Drake summoning him to the vicinity of the shooting post. Sgt. Tolson arrived and PO Drake informed him that three individuals – identified as § 87(2)(b) and § 87(2)(b) – had refused to obey an order to disperse, and as such he intended to issue them summonses for disorderly conduct. PO Drake did not inform Sgt. Tolson of any specific behavior that led him to order the individuals to disperse in the first place. Sgt. Tolson did not recall whether PO Drake mentioned being asked for his name and shield number. Sgt. Tolson recalled interacting with one of the civilians; this interaction consisted essentially of explaining that they had

been ordered to disperse in regards to the recent shooting in the area.

Sgt. Tolson stated that the information imparted to him by PO Drake was sufficient to determine that PO Drake was issuing the summonses legally. Therefore, he authorized PO Drake to issue the summonses, and all officers left the scene.

Witness Officer: PO KIRK BIRMELIN

- § 87(2)(b)
- 67th Precinct Impact footpost, in uniform, with PO Drake, from 7:30 p.m. on May 24, 2010 until 4:05 a.m. on May 25, 2010.

Memo Book

PO Birmelin noted in his memo book [Encl. D 9-11] that three males were stopped at 9:40 p.m., and that three summonses were served by PO Drake at 10:05 p.m.

CCRB Testimony

PO Birmelin was interviewed at the CCRB on September 21, 2010 [Encl. D 12-13].

PO Birmelin acknowledged that part of shooting post assignments is to keep groups from gathering on the sidewalk. He added that the purpose of preventing large groups from gathering in public is to preempt fights, which can lead to further shootings.

PO Birmelin stated that, when he and PO Drake first passed the illegally parked vehicle, § 87(2)(b) and § 87(2)(b) were all already gathered around the vehicle. PO Birmelin did not recall the language PO Drake used to issue his initial order, but his understanding was that this order involved telling the civilians both to move the car and move their persons off the sidewalk. PO Birmelin stated that both he and PO Drake verbally provided § 87(2)(b) with their names and shield numbers. PO Birmelin recalled PO Drake issuing § 87(2)(b) and § 87(2)(b) only one order to disperse upon his return to the area of the parked vehicle. PO Birmelin stated that the civilians were evidently unhappy about the orders issued by PO Drake, but they were not behaving aggressively. PO Birmelin was not privy to any conversations between Sgt. Tolson and PO Drake or § 87(2)(b)

§ 87(2)(b)

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Status of Civil Proceedings

As of January 24, 2011, § 87(2)(b) and § 87(2)(b) have not filed notices of claim with the City of New York with regards to this incident.

§ 87(2)(b)

Civilian CCRB History

As of January 24, 2011, this is the first CCRB complaint filed by § 87(2)(b) or § 87(2)(b) [Encl. B 3-5].

Subject Officer CCRB History

- PO Jason Drake has been a member of the service for 2 years and there are no substantiated CCRB

- allegations against him [Encl. B 1].
- Sgt. Andrew Tolson has been a member of the service for 7 years and there are no substantiated allegations against him [Encl. B 2].

Conclusion

Identification of Subject Officers

PO Drake acknowledged making the decision to issue summonses to § 87(2)(b) and § 87(2)(b). Sgt. Tolson acknowledged authorizing the issuance of these summonses. Therefore, the allegations are pleaded against PO Drake and Sgt. Tolson.

Investigative Findings and Recommendations

Allegation A – Abuse of Authority: PO Jason Drake issued improper summonses to § 87(2)(b)

and § 87(2)(b)

Allegation B – Abuse of Authority: Sgt. Andrew Tolson authorized the issuance of improper summonses to § 87(2)(b) and § 87(2)(b)

The disorderly conduct statute and subsection cited in PO Drake’s summonses – New York State Penal Law §240.40(6) [Encl. A 1] – reads as follows: “A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: ... (6) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.” People v. Jones, 2007 NY Slip Op 9070; 9 N.Y.3d 259 (2007) [Encl. A 2-4], states that, for a disorderly conduct summons to be valid, it must “set forth a prima facie case” that the offending action – in this case, congregating and refusing to disperse – was performed, as per the statute, “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.” People v. Yarborough, 2010 NY Slip Op 51223U; 28 Misc. 3d 1208A (2010) [Encl. A 5-8] applies the same standard specifically to subsection 6 of the disorderly conduct statute, stating that “in the absence of allegations which demonstrate a nexus between the defendant’s conduct and its impact upon the public peace and order, the act of disobeying a police command... falls outside the purview of behavior proscribed by the Disorderly Conduct statute, and will not support a prima facie violation of this statute.” Thus, according to Jones and Yarborough, an action corresponding to one of the subsections of the statute, such as refusing to follow a police order to disperse, is by itself insufficient to justify a disorderly conduct summons if the issuing officer does not articulate how the defendant either intentionally disrupted the order of the surrounding community, or recklessly risked doing so. On August 10, 2010, the NYPD in fact clarified this point by issuing Operations Order # 37 [Encl. A 9-10], which modifies the form of the Department’s criminal summonses to facilitate the listing of specific allegations detailing the ways in which a defendant’s behavior violated the disorderly conduct summons.

§ 87(2)(b), § 87(2)(g)

[REDACTED]

§ 87(2)(b), § 87(2)(g) [Redacted]
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Team: _____

Investigator: _____
Signature Print Date

Supervisor: _____
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Reviewer: _____
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